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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 278

MONOLITH PORTLAND CEMENT COMPANY, a Corporation,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and WILLIAM M. BENNETT, PETER E. MITCHELL, EVERETT C. McKEAGE, GEORGE G. GROVER, and FREDERICK B. HOLOBOFF, the members of and constituting said Public Utilities Commission,
Respondents.

Brief of Respondents in Opposition

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The Public Utilities Commission of the State of California (hereinafter referred to as Commission) and William M. Bennett, Peter E. Mitchell, Everett C. McKeage, George G. Grover and Frederick B. Holoboff, as members of and constituting said Commission, Respondents, for their statement in opposition to Petition for a Writ of Certiorari of Monolith Portland Cement Company, Petitioner (hereinafter referred to as Monolith), respectfully show the following:

I.

STATEMENT OF FACTS

The Commission is the fully constituted and acting authority of the State of California having regulatory jurisdiction over all public utilities, including railroads and other transportation companies. (Section 17, 19-23a of Article XII of the Constitution of California: the Public Utilities Act, Statutes 1915, Chapter 91, as amended: and the Public Utilities Code, Statutes 1951, Chapter 764 as amended).

The Atchison, Topeka and Santa Fe Railroad Company (Santa Fe), Real Party in Interest, is an intrastate and interstate carrier of freight and passengers by railroad.

The proceeding now before the Court, as limited by Petitioner, was commenced by a Commission investigation into the lawfulness of cement rates charged by Santa Fe from certain cement plants. (Petition, page 8, Appendix "A"). The rail points involved were: Oro Grande (American Cement Co.), Victorville (Southwest Portland Cement Co.), and Cushenbury (Permanente Cement Co.) in the State of California to the California Aqueduct System of the Feather River Project in the San Joaquin Valley as far north as Merced, California. The pertinent facts are set forth in detail in Commission Decision No. 66487, reported in 62 California Public Utilities Reports 49.[1]

Monolith filed with the Commission a petition requesting suspension of the cement rates that had been filed by Santa Fe. The rates were suspended and after seven days of public hearings the Commission issued said decision. Thereafter, a petition for writ of review was filed with the Supreme Court of California, which was denied without opinion on June 22, 1964.

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1. (For convenience of the Court copies of said decision are being filed herewith.)

II.

STATEMENT OF ISSUES ON APPEAL

The sole question presented by Petitioner to the Court and to the California Supreme Court is:

> May common carriers, by agreement between themselves, prefer and discriminate between places and persons, similarly situated for the same transportation service and in so doing thereby deny Petitioner equal protection of the law and due process under the Fourteenth Amendment?

The Commission decision (62 Cal. P.U.C. 49, 59) contains no finding that the rates in question are preferential or discriminatory, in fact the findings are contra:

> "We find:
>
> The suspended rates are above out-of-pocket costs and are compensatory whereas the existing rates from Monolith to San Joaquin Valley points are already below out-of-pocket costs and hence are already not compensatory and are insufficient; and by reason of the foregoing, the suspended rates are not unreasonably low in relationship to the rates from Monolith to San Joaquin valley points; *they do not grant an undue preference or advantage* to American Cement Corporation, Permanente Cement Company and Southwestern Portland Cement Company; *or subject Monolith Portland Cement Company to any undue prejudice or disadvantage* in connection with the transportation of bulk cement from their respective plants to San Joaquin Valley points; and *the suspended rates do not unjustly discriminate against Monolith Portland Cement Company or the locality of Monolith* in connection with transportation of bulk cement to San Joaquin Valley points." (Emphasis added.)

III.

ARGUMENT

The question presented to this Honorable Court is merely a broad and far fetched attempt to state a Federal Consti-

tutional question claiming that Petitioner has been deprived of equal protection of the law. Petitioner blandly states it has been denied equal protection of the law under the Fourteenth Amendment to the United States Constitution, the California Constitution (Article XII, Section 21), and the California Public Utilities Code (Sections 453, 1757, 1760), but makes no mention as to exactly how the constitutional guarantee has been violated. Further, there is no specification of the Petitioner's property that has been alleged to have been confiscated. It is respectfully submitted, there is no constitutional question involved herein, and if there were it would have been explicitly stated before the Supreme Court of California and to this Honorable Court. Moreover, the question is entirely one of fact based upon the law of the State of California. This Court has long held that the regulation of intrastate railroad services is primarily the concern of the state.

North Carolina v. United States (1945) 325 U.S. 507, 511, 89 L.Ed. 1760, 1765.

It should ever be borne in mind that the Constitution of California, Article XII, Section 21, and the United States Constitution, Fourteenth Amendment, do not guarantee or seek to prevent *all* differences in rates between places but *only unreasonable differences or discriminations.*

Petitioner at no time specifically states wherein or how the decision is unreasonable or arbitrary. Discrimination based upon reason can properly and legally exist.

Cal. Portland Cement v. Public Utilities Commission, 49 Cal. 2d 171, 315 P.2d 709.

The actual fact is Petitioner does not have a disadvantage in competing for business at the San Joaquin Valley points.

What it is attempting to do is maintain its heretofore existing advantage of rates from 6½ to 7½ cents per 100 pounds rather than the advantage of rates 3 cents lower than those from the same area resulting from rates authorized by the Commission's decision now before the Court.

The attention of the Court in this regard is directed to the Commission's decision herein 62 Cal. P.U.C. 49, at page 59. The table sets forth clearly and demonstrates the fact that Petitioner still has a rate advantage. Taking the table, to show the out-of-pocket costs from Petitioner's plant and excluding the 5:1 cents per 100 pounds penalty paid by Santa Fe to Southern Pacific Company, Monolith still has a rate advantage over the other points in question of 3 cents per 100 pounds. With this 3 cent advantage nevertheless Petitioner claims it is discriminated against and the rates in question are preferential.

Does this unchallenged fact result in unequal protection of law?

As stated in *Anchor Coal Co. v. U.S.*, 25 F.2d 462, 471, how can a competitor who is the complainant be injured by a rate higher than his rate?

IV.

MILEAGE IS NOT A PARAMOUNT FACTOR

Petitioner contends that mileage must be the paramount consideration or discrimination will result. Mileage is but a single factor entering into a composite and intricate picture in fixing railroad rates. The rates from Petitioner's plant are lower but the rates on a mile-for-mile basis are higher; however, this does not amount to discrimination or unequal protection of law.

Discrimination, or as sometimes stated, undue prejudice or undue preference, is a question of fact to be determined

in the light of all relevant circumstances by the proper regulatory agency which in this case is the Commission.

Texas and Pacific Railway v. I.C.C., 162 U.S. 197, 219, 40 L.Ed. 940;

U.S. v. Louisville and N. R. Co., 235 U.S. 314, 320, 59 L.Ed 245;

Nashville C. and St. L. R. Co. v. Tennessee, 262 U.S. 312, 67 L.Ed. 996;

Calif. Portland Cement v. Southern Pacific Co., 35 Cal. R. C. 904, 906.

It has long been the practice of railroads by statute and with the approval of regulatory bodies to fix a lower per mile basis for rates involving longer hauls as compared to shorter hauls, providing the rate for the longer haul is not less than the rate for a shorter haul over the same line. Examples of this are:

California Constitution, Article XII, Section 21;
California Public Utilities Code, Section 460.

What is an undue or unreasonable preference or advantage is a question of fact.

Pennsylvania Co. v. United States, 236 U.S. 351, 59 L.Ed. 616.

The findings and conclusions of the Commission on questions of fact are final and not subject to review. The party claiming confiscation or unreasonable preference has the burden of proof.

Sutter Butte Canal Co. v. Railroad Comm., 279 U.S. 125, 79 L.Ed. 637;

Los Angeles G. & E. Corp. v. Railroad Comm., 289 U.S. 287, 305, 77 L.Ed. 1180, 1192;

Calif. Public Utilities Code, Section 1757.

A statutory discrimination will not be set aside under the Fourteenth Amendment if any state of facts may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 6 L.Ed. 2d 393.

To fix railroad freight rates solely on a mileage basis as Petitioner desires, if applied to transportation between California and points throughout the United States, would be a disaster to the economy of the state.

V.

JOINT TRACK AGREEMENT OF 1912

By the terms of the 1912 agreement, the section of track between Mojave and Bakersfield, California, is owned by Southern Pacific Company and is to serve Santa Fe only as a "bridge". It is further provided that Santa Fe is prohibited from soliciting traffic originating or destined thereon and can do no business on this track unless required to do so by law. If Santa Fe does any business on the so-called "bridge", it must pay to Southern Pacific Company 60 per cent of the rate which in the case of cement is 5.1 cents per 100 pounds as a penalty. Santa Fe as a public carrier is required by law to accept and deliver all freight tendered to it for pickup and delivery on the "bridge". Petitioner's cement plant being located upon the Southern Pacific Company track is in reality a Southern Pacific Company rail-point, but because of the agreement for the joint use, Santa Fe is required by law to serve Petitioner.

Petitioner contends that because of the 1912 agreement between Southern Pacific Company and Santa Fe for the joint usage of the track between Mojave and Bakersfield, 60 per cent of the local rate payment is the result of a private agreement voluntarily entered into, and that the

Monolith rates are compensatory because the 5.1 cents per 100 pounds paid by Santa Fe to Southern Pacific Company cannot be considered a proper cost. This contention is based upon the established rule of law, with which we agree, that a shipper's legal rights cannot be disregarded because of agreements between carriers voluntarily made. However, this rule and the cases cited by Petitioner (pp. 13-16) are concerned only with the division between carriers of joint rates and are not in point.

The case of *United States v. Baltimore & O.R. Co.*, 333 U.S. 169, 92 L.Ed. 618, upon which Petitioner so heavily relies is readily distinguishable from the case now before the Court. The *Baltimore* case involved the effect of a railroad's contract with a union stockyard, owners of a side track, as to the alleged discriminatory refusal of the railroad to carry livestock of third persons over the track because of certain conditions of the contract compelling that course of action. It was held that the order of the Interstate Commerce Commission requiring the railroad to operate the track without discrimination, founded upon an act of Congress providing that no railroad should engage in certain types of discriminatory conduct, was not invalid as depriving the stockyard company of its property without due process of law. The opinion explains that there is no depriving of an owner of property without due process of law in denying him "the right to enforce conditions upon its use which conflict with the power of Congress to regulate railroads" *so as to secure equality in the treatment of those whom the railroad serves.*

This is not the situation in the case now before the Court. Here we are not concerned with a division of joint rates between carriers. A division of joint rates is where the par-

ticipating carriers divide the revenue resulting from a joint through rate.

When the carriers cannot agree upon a division, the Commission by Public Utilities Code, Section 733 and the I.C.C. by Section 15(6) of the Interstate Commerce Act are given the authority to fix the division of revenues, but there is no division of revenue involved here.

A carrier's division of a joint rate is the revenue accruing, which it receives for *performing part of the service* covered by the joint rate.

New England Divisions, 85 I.C.C. 482, 492.

Petitioner completely ignores the fact that Southern Pacific Company does not perform any part of the transportation service, yet it is entitled to the penalty payment provided in the 1912 contract. Upon this fact alone the matter now before the Court must be distinguished from a case involving the division of rates. As the Commission's decision points out, we are not concerned with joint rates and the 5.1 cents is not a division of revenue. It is a penalty paid by Santa Fe for doing business on the joint track or "bridge".

In re Southern Pacific Co., 1 California Railroad Commission 470, 471, the Commission approved the 1912 contract and stated:

> "The representatives of the applicants were closely questioned but nothing was developed to disclose or indicate anything unfair to any of the parties to the agreement or injurious to the interests of the public. We believe that such joint operation and joint participation in upkeep, and other expenses will be of distinct advantage to applicants and without injury to any one. While in many cases of this kind the Commission will desire to investigate the value of the property leased, to ascertain the reasonableness of the rental price, we

do not deem such investigation necessary in this case. We recommend that the prayer of applicants be granted; that the agreement or contract as to the joint operation of this line or road in question be approved and that an order be issued authorizing such joint operation, and we submit herewith a form of order."

The Interstate Commerce Commission (I.C.C.) has had exclusive jurisdiction over the 1912 agreement since 1920. When the agreement by its terms expired January 1, 1962. Southern Pacific Company and Santa Fe were unable to reach a new agreement. Until a new agreement is reached. Santa Fe is required to operate over the "bridge" under the same rates and conditions until otherwise authorized by the I.C.C. The existing situation is that Santa Fe does not have it within its rights or power to charge the local rates or conditions. Yet, this fact is exactly what Petitioner contends the Commission should disregard in fixing the new rates.

The most important fact that the Court should bear in mind is that the present rates from Monolith are below out-of-pocket costs and are not compensatory while the rates in question will be compensatory and above out-of-pocket costs. The Commission has specifically made this finding based upon the fact that Santa Fe's out-of-pocket expense includes 5.1 cents per 100 pounds because of the payment to Southern Pacific Company for any shipment from Petitioner's plant at Monolith to San Joaquin Valley points. The 5.1 cents is a real, existing expense that has been approved by the I.C.C. and the Commission. If Santa Fe were required to reduce these rates from Monolith such rates could be assailed as confiscatory.

VI.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

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Dated: September 21, 1964.